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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 83

NORTHERN NATURAL GAS COMPANY, a Corporation, and CITIES SERVICE GAS COMPANY, a Corporation,
Appellants,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, AND PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Panhandle Eastern Pipe Line Company, appellee, moves to dismiss these appeals from judgments of the Supreme Court of the State of Kansas on the grounds that such judgments rest on adequate nonfederal bases, that the alleged federal question was not properly raised and that no substantial federal question is presented.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas are reported at 192 Kan. 2, 386 P.2d 266 (Jurisdictional Statement A1) and 192 Kan. 29, 386 P.2d 288 (Jurisdictional Statement A75).

JURISDICTION

Appellants attempt to invoke the jurisdiction of the the Supreme Court of the United States under 28 U.S.C., § 1257 (2).

QUESTIONS PRESENTED

Whether the judgments of the Supreme Court of the State of Kansas rest on adequate nonfederal bases, whether any federal question was properly raised and whether the State Corporation Commission of the State of Kansas or private pipe line companies shall fix the amount of natural gas to be produced from the Kansas Hugoton gas field.

STATEMENT

This case concerns orders entered by the State Corporation Commission of the State of Kansas.[1] In 1956, the Kansas Commission began hearings to reconsider the method by which it calculated the amount of natural gas

1. Cases related to this proceeding and on appeal to this Court are No. 75, *Colorado Interstate Gas Company* v. *The State Corporation Commission of the State of Kansas et al.*, and No. 140, *Kansas-Nebraska Natural Gas Company, Inc.*, v. *The State Corporation Commission of the State of Kansas et al.*

that could be produced from wells located in that part of the Hugoton gas field situated in the State of Kansas. Prior to that time, the Kansas Commission had, after hearings and in the manner described below, fixed the amount of gas to be produced from the Kansas Hugoton field on the basis of monthly estimates submitted by the pipe line companies purchasing gas from that field. Each month the Kansas Commission accepted without question the pipe line companies' estimates, adding to the total estimates the amount of gas, if any, taken in the prior month in excess of the amount fixed by the Commission for that month and subtracting the amount, if any, which under the Commission's order for the prior month any company or companies could have taken but failed to take. Thus, the amounts of gas actually taken by the companies controlled the Kansas Commission's determinations (Jurisdictional Statement A10-A12, A32-A33). The Kansas Supreme Court held that the practice of subtracting amounts of gas not taken was unauthorized under both the applicable Kansas Statute and the Kansas Commission's own orders (*id.* at A31-A34).

Beginning in May, 1956, the Kansas Commission employed several variations in its procedure, finally adopting a method based largely upon the total of the pipe line companies' estimates. The most significant change in the Kansas Commission's procedure was that the amount of gas not taken under the prior month's determination was no longer subtracted from the amount determined by the Commission to be necessary to satisfy the market demand for gas for the current month. This has made available to the pipe line companies additional quantities of gas, and the appellants contend that this is unlawful.

Three types of orders issued by the Kansas Commission are involved in this appeal: (1) monthly orders for

each month during the periods from May, 1956, through November, 1957, from October, 1958, through January, 1959, and from October, 1959, through March, 1960, fixing the amount of gas available to be produced in each of those months; (2) semi-annual orders determining the market demand for gas from the Kansas Hugoton field for the six months' periods from October, 1958, through March, 1959, and from October, 1959, through March, 1960; and (3) a general order effective February 1, 1958, specifying the method by which the Kansas Commission proposed to determine the amount of gas to be produced by each well in the field. Ultimately, these orders were reviewed by the Supreme Court of the State of Kansas in seven separate cases and disposed of in two opinions. No other orders are involved in these appeals.

1. **Proceedings Arising in the District Court of Finney County, Kansas.**

Appellant, Northern Natural Gas Company ("Northern"), petitioned the District Court of Finney County, Kansas, for judicial review of the above described orders and no other orders. In each instance in which Northern petitioned for judicial review, this appellee, Panhandle Eastern Pipe Line Company ("Panhandle"), and the appellee Southwest Kansas Royalty Owners Association ("Royalty Owners") intervened.

(a) Kansas Supreme Court Cases 41,516 and 41,556. The Finney County District Court entered judgment setting aside the Kansas Commission's general order effective February 1, 1958, and setting aside all of the Commission's monthly orders covering the period from May, 1956, through November, 1957, insofar as they permitted production of gas in excess of that which would have been permitted under the Commission's previous practice. (Juris-

dictional Statement A44-A46). Appeals were taken from such judgment by Panhandle, the Kansas Commission and the Royalty Owners, all being docketed by the Kansas Supreme Court as Case 41,516. Appellant Cities Service Gas Company ("Cities") was not at any time a party to Case 41,516.

Subsequently, the Finney County District Court entered judgment setting aside to the same extent the Kansas Commission's monthly orders covering the period from October, 1958, through January, 1959, and the semiannual order estimating market demand for the period from October, 1958, through March, 1959 (Jurisdictional Statement A46-A48).. Appeals also were taken from such judgments by Panhandle, the Commission and the Royalty Owners, all being docketed by the Kansas Supreme Court as Case 41,556. Cities was not at any time a party to Case 41,556.

Case 41,515 and 41,555, to which neither Northern nor Cities is a party, involve proceedings initiated by Colorado Interstate Gas Company for judicial review of all the orders challenged by Northern and Cities and certain orders not challenged by them. Colorado Interstate has also taken an appeal to this Court. See No. 75, October Term, 1964.

Cases 41,516 and 41,556, together with Cases 41,515 and 41,555, were disposed of by the Kansas Supreme Court in a single opinion appearing at 192 Kan. 2, 386 P.2d 266 (Jurisdictional Statement A1). Included among the reasons given for reversing the judgments of the Finney County District Court are the following nonfederal grounds:

First, no timely applications for rehearing were filed with the Kansas Commission respecting the orders issued

prior to November 1957 (*id.* at A14-A18). Under the procedure prescribed by Section 55-606 of the Kansas General Statutes (G.S. 1949, 55-606), a timely petition for rehearing filed with the Commission is prerequisite to judicial review.

Second, the Kansas Commission's general order (effective February 1, 1958), describing the procedure which the Commission proposed to follow in the calculation of the amount of gas which may be produced by wells in the Kansas Hugoton field, was construed by the Kansas Supreme Court to have only prospective application. Judicial review is unavailable until the Commission implements the general order (Jurisdictional Statement A18-A19).

Third, when the Finney County District Court set aside the Kansas Commission's monthly orders from May, 1956, through January, 1959, it exceeded its statutory authority and erroneously substituted its determinations for those of the Commission (*id.* at A20-A23). References to the trial court's erroneous judgments and the orders involved in these appeals and affected by such judgments are as follows:

Orders Covering the Period	Judgments
May, 1956, through November, 1957, and General Order effective February 1, 1958	Jurisdictional Statement A44-A46
October, 1958, through January, 1959	Jurisdictional Statement A46-A48

The trial court's error on this point had a more widespread effect, in terms of the number of orders involved, than any of the trial court's other reversible errors.

Fourth, the Finney County District Court disregarded its statutory duty to make findings of fact and conclusions of law when requested to do so by Panhandle (Jurisdictional Statement A23-A25).

Fifth, as discussed in detail in its opinion reported in 192 Kan. 29, 386 P.2d. 288 (Jurisdictional Statement A75), the Kansas Supreme Court held that the Finney County District Court lacked jurisdiction to review the semiannual market demand order for October, 1958, through March, 1959, and monthly orders for October, 1958, through January, 1959, because petitions for judicial review of the same orders had been filed earlier in the District Court of Stevens County, Kansas (Appendix A). Proceedings in the Stevens County District Court to review these orders have been continued pending disposition of the instant appeals (Appendix B).

(b) Kansas Supreme Court Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated). The Finney County District Court entered judgment affirming the Kansas Commission's semiannual market demand order for October, 1959, through March, 1960, and affirming in part and reversing in part the orders for each month during that period (Jurisdictional Statement A90-A94). Appeals were taken from such judgment and consolidated with other similar appeals, all such appeals being docketed by the Kansas Supreme Court as Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated). These cases were disposed of by the Kansas Supreme Court in the opinion appearing at 192 Kan. 29, 386 P.2d 288 (Jurisdictional Statement A75), on the nonfederal ground that exclusive jurisdiction to review the Commission's October, 1959, through March, 1960, orders was vested in the Stevens County District Court, petitions for judicial review having been filed there earlier than in the Finney County District Court

2. **Proceedings Arising in the District Court of Stevens County, Kansas.** The Royalty Owners and Panhandle petitioned the Stevens County District Court for judicial review of the Kansas Commission's orders described in the preceding paragraph (b). All such petitions were consolidated, and in accordance with accepted practice, the Stevens County District Court set the consolidated petitions for trial on February 13, 1960 (Appendix C). By court order dated February 6, 1960, both Northern and Cities were directed to proceed in the Stevens County District Court, presenting to it their grievances respecting the Kansas Commission's orders (Appendix D). Both Northern and Cities refused.

Trial of the petitions was held as scheduled on February 13, 1960 (Appendix E). Neither Northern nor Cities appeared or participated in the trial, and there were no requests for continuance. In regular course the Stevens County District Court on March 10, 1960, entered judgment, affirming the Kansas Commission's orders (*ibid.*).

Northern on March 13, 1960, appeared specially before the Stevens County District Court and moved to vacate that court's judgment on grounds which raise no federal question (Appendix F). At a hearing held March 19, 1960, on Northern's motions to vacate the court's judgment the following colloquy occurred between Mr. Adams, attorney for Northern; and the Stevens County District Court:

> "Mr. Adams: There is one other distinction between the cases that were filed here by Panhandle and the cases we were talking about in the Finney County District Court. *All of these cases before your Honor, all they want is more gas. That is the only ground for the judicial review. They want more gas than the Commission allowed them. Now there is an entirely different issue in the cases in the District Court*

of Finney County, Kansas. Those issues have never been before Your Honor. That is that as the Commission has interpreted the amendment to Section 55-703 of the Statute, the Statute is unconstitutional. That issue is not in these judicial review proceedings or actions that are here before the Court.

"The Court: I don't think my order has ruled on the constitutionality of the statute because the constitutionality of the statute was not urged before me and consequently my ruling does not include that phase of it. It was under the statute that my rulings have been made.

"Mr. Adams: Assuming the statute to be valid.

"The Court: It was not before me as to whether it was valid or not valid, so I haven't determined that one way or the other as I see it. In other words, the proceedings that was had before me was urged on the theory, I suppose, that it was valid. Anyway, I took it from there, I have not ruled, I had no briefs, and I haven't even had it contested before me as to the constitutionality of the statute, which I heard that Judge Tate had but I have not. (Trial Court Tr. 33-34).

"The Court: My theory being that * * * since this statute was effective * * * (this is) a different series of cases and that (since) Southwest Kansas Royalty Owners' Association was in first, * * * I had jurisdiction. Now, it's all based on that. Now, if you are right on these other points, if you are right on the point that they have no legal entity to perfect this appeal, then I am wrong all the way down, but if you are wrong on that, I am convinced that I have jurisdiction all the way through. (Trial Court Tr. 35, 36)." (No. 42,038, Abstract of the Record of Appellants Cities Service Gas Company and Northern Natural Gas Company 286-287.) (Emphasis supplied.)

As specifically conceded by Northern's attorney, the only ground for judicial review in the Stevens County District Court was whether the Kansas Commission had allowed

the petitioners (Panhandle and the Royalty Owners) sufficient gas. The issue of the constitutionality of the Kansas statutes, as interpreted by the Kansas Commission, was not before the Stevens County District Court and played no part in its judgment.

The Stevens County District Court overruled Northern's motions to vacate its judgment (Appendix G). Cities filed no such motions. Appeals were taken from the judgment of the Stevens County District Court to the Kansas Supreme Court, all such appeals being docketed there as Case 42,038.

At no time did either Northern or Cities intervene in the judicial review proceedings before the Stevens County District Court; to the contrary, they refused to submit to that court's jurisdiction, which the Kansas Supreme Court held was exclusive. Nevertheless, both Cities and Northern filed Notices of Appeal from a judgment entered in a proceeding to which they never were a party, attempting to raise a federal issue which Northern advised the Stevens County District Court was not before it for adjudication. With the proceedings in Case 42,038 in this posture, appeals from the Stevens County District Court failed to present to the Kansas Supreme Court the federal question which Northern and Cities urge upon the Supreme Court of the United States.

In summary, in proceedings before the Kansas Supreme Court, review of which is sought here, Northern was a party to Cases 41,516 and 41,556 and Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated). Northern was not a party either to Cases 41,515 and 41,555, or to Case 42,038, although in the last case Northern attempted to appeal to the Kansas Supreme Court.

Cities, on the other hand, was a party to Cases 42,175, 42,176, 42,185 and 42,230) (Consolidated), each arising from a trial court that lacked jurisdiction. Cities was not a party either to Cases 41,515, 41,516, 41,555 and 41,556 or to Case 42,038, although it, too, attempted to appeal the last case to the Kansas Supreme Court.

In each of the cases to which Northern and Cities were parties or from which they attempted to appeal the judgment of the Kansas Supreme Court is based upon a nonfederal ground adequate in itself to sustain the disposition made by that court.

ARGUMENT

The Judgments of the Kansas Supreme Court Rest upon Adequate Nonfederal Grounds, and No Federal Question Was Properly Raised

This Court has repeatedly held that it lacks jurisdiction to review a state court's decision based upon an independent state ground sufficient to support its judgment. A case such as this, as this Court has previously stated, "is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Decisions acknowledging this rule, in addition to those cited in the *Mulier* case, include:

Cramp v. *Board of Public Instruction of Orange County, Florida*, 368 U.S. 278, 281 (1961).

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956).

Stembridge v. *State of Georgia*, 343 U.S. 541 (1952).

Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120, 129 (1945).

Holley v. *Lawrence*, 317 U.S. 518 (1943).

Moreover, this Court declines to assume jurisdiction over an appeal from the judgment of a state court where it does not appear upon which of two grounds, one federal and one nonfederal, the judgment rests. *Lynch* v. *People of New York ex rel. Pierson*, 293 U.S. 52 (1934).

Northern seeks review by this Court of a judgment entered by the Kansas Supreme Court in four cases (Cases 41,515, 41,516, 41,555 and 41,556). It was a party to only two of such cases (Cases 41,516 and 41,556), each of which was decided by the Kansas Supreme Court on manifestly nonfederal grounds:

Kansas Supreme Court Case 41,516.

1. Failure to file timely petitions for rehearing with the Kansas Commission as required by state law.

2. The Kansas Commission's general order operates prospectively and is not subject to judicial review by Kansas courts until implemented by the Commission.

3. The trial court (District Court of Finney County, Kansas) substituted its judgment for that of the Kansas Commission, contrary to the statutory authority granted to such court.

4. The trial court failed to discharge its statutory duty to make findings of fact and conclusions of law when requested to do so by a party.

Kansas Supreme Court Case 41,556.

1. The trial court (District Court of Finney County, Kansas) lacked jurisdiction to review the Kansas Commission's orders covered by Case 41,556

because petitions for judicial review of such orders were filed first in the District Court of Stevens County, Kansas.

2. The trial court substituted its judgment for that of the Kansas Commission, contrary to the statutory authority granted to such court.

3. The trial court failed to discharge its statutory duty to make findings of fact and conclusions of law when requested to do so by a party.

Under the law of the State of Kansas, the orders of the Commission are presumed to be valid.[2] They remain in force until set aside by a district court in the manner provided by statute. As indicated by the Kansas Supreme Court in the present case, a Kansas district court has no authority to review the Kansas Commission's orders except to the extent permitted by statute (Jurisdictional Statement A22). The Finney County District Court not only exceeded its statutory authority, erroneously substituting its judgment for that of the Commission, it also failed to discharge its statutorily imposed duty to make findings of fact and conclusions of law. Therefore, because the Finney County District Court departed from the procedures for judicial review established by Kansas statutes, its judgment was reversed. As a consequence, the Kansas Commission's orders remain in effect. Precisely the same errors committed by the Finney County District Court in the present case were committed by the trial court in *Cities of McPherson* v. *State Corporation Commission*, 174 Kan. 407, 257 P.2d 123 (1953). The Kansas Supreme Court, noting the similarity of the statutory judicial review provisions involved in both cases (Jurisdictional Statement A22),

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2. *Bennett* v. *State Corporation Commission*, 157 Kan. 589, 142 P.2d 810, 815 (1943).

terminated the litigation in each of them by reversal of the trial courts' judgments.

In addition, Northern requests this Court to review a judgment entered by the Kansas Supreme Court in four cases (Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated)). These cases were disposed of by the Kansas Supreme Court on the unmistakably nonfederal ground that the trial court (District Court of Finney County, Kansas) lacked jurisdiction.

Northern further urges this Court to review the judgment entered by the Kansas Supreme Court in Case 42,038, but Northern refused to submit to the jurisdiction of the trial court from which that proceeding arose (District Court of Stevens County, Kansas), never intervened in that proceeding, and represented to that court that the only issue before it was Panhandle's request for additional quantities of gas, conceding that the question of the constitutionality of the applicable Kansas statute, as interpreted by the Kansas Commission, was raised only in the Finney County District Court. In light of these circumstances, the Kansas Supreme Court disposed of Northern's contentions with the determination that the Finney County District Court lacked jurisdiction. Apart from the obvious fact that Northern had never been a party to the proceeding in the court which did have jurisdiction (Stevens County District Court), its attempted appeal was from denial of a motion to vacate that court's judgment, which had been entered after a trial in which Northern had refused to participate. Northern also failed to raise any federal question in its motion to vacate.

Cities appeals from the judgment of the Kansas Supreme Court in Cases 42,175, 42,176, 42,185 and 42,230 (Consolidated). As previously stated, the Kansas Su-

preme Court held that the trial court in such cases (Finney County District Court) lacked jurisdiction over the Kansas Commission's orders, which are the subject of those appeals.

Cities also asks review of the Kansas Supreme Court's judgment in Case 42,038, although Cities, like Northern, refused to submit to the jurisdiction of the trial court (Stevens County District Court) and never intervened in the proceedings in that court. Unlike Northern, Cities at no time moved to vacate the trial court's judgment, a tactic which Northern did belatedly attempt.

SUMMARY

Northern Natural Gas Company

Kansas Supreme Court Case		Reason for Dismissal of These Appeals
41,515		Northern not a party
41,516		Trial court's judgment reversed on nonfederal grounds.
41,555		Northern not a party
41,556		Trial court's judgment reversed on nonfederal grounds.
42,175)		Trial court's judgment reversed on nonfederal grounds
42,176)	Consolidated	
42,185)		
42,230)		
42,038		Northern not a party and federal question not properly raised.

Cities Service Gas Company

Kansas Supreme Court Case	Reason for Dismissal of These Appeals
41,515	Cities not a party.
41,516	Cities not a party.
41,555	Cities not a party.
41,556	Cities not a party.
42,175)	Trial court's judgment re-
42,176) Consolidated	versed on nonfederal grounds.
42,185)	
42,230)	
42038	Cities not a party and federal question not properly raised.

The State Corporation Commission of the State of Kansas, Not Private Pipe Line Companies, Should Determine the Amount of Natural Gas Which May Be Produced from the Kansas Hugoton Gas Field

The merits of these appeals present only the nonfederal question of whether a majority of the pipe-line companies or the Kansas Commission may control the amount of gas which lawfully may be produced from the Kansas Hugoton gas field. Procedural deficiencies previously discussed are dispositive of these appeals. Nevertheless, to dispel any impression that Northern and Cities may be deprived of the opportunity to assert a meritorious case only because of procedural deficiencies, we desire to focus attention upon the issue on the merits and rescue it from the distortion to which it has been subjected by them in their attempt to convert a purely local question into a federal-state conflict.

The litigation in its entirety involves the validity of producing allowables, i.e., the amount of gas which individual wells are permitted to produce in a given period of time. It would be difficult to conceive of something more squarely within the function of production, which, under the "production and gathering" exclusion of the Natural Gas Act, is reserved for regulation by the states (15 U.S.C. § 717(b), Jurisdictional Statement 34).

Apart from this rather obvious disposition of Northern's and Cities' basic contention that the jurisdiction of the Federal Power Commission has been invaded, we call attention to the fact that the true issue raised by them is not whether the Kansas Commission or the Federal Power Commission is the agency empowered to set gas well allowables, but whether the Kansas Commission or the pipe line companies should have actual control of the allowables.

There were three sides to this litigation in the state court. The appellants attacked the Kansas Commission's orders, contending that the Commission was required to deduct underages from, and add overages to, the amount required to satisfy market demand.[3] This has been characterized as the historic method of computing allowables. If this was done the market demand determination had no ultimate effect on allowables because past runs controlled current allowables. Panhandle and the Royalty Owners attacked the orders on the grounds that the actual market demand, as shown by the evidence, vastly exceeded the

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3. Underages are amounts of gas which could have been produced under prior orders of the Commission, but were not taken by the pipe line companies. Overages are amounts of gas which the pipe line companies have taken in excess of quantities authorized by prior orders of the Commission.

nominations (estimates of amounts of gas to be purchased) filed by the pipe line companies and that the Commission had no right to let a majority in interest of the pipe line companies determine allowables, either by actual purchases (as was the case if underages were subtracted and overages added each month) or by nominations. The Commission defended its orders but objected to having to defend the same order in more than one court.

The Commission sometimes accepted the nominations as the market demand and sometimes increased them in inconsequential amounts, but no longer deducted underages or added overages for the previous month. The District Court of Finney County in the early cases (Nos. 41,515, 41,516, 41,555 and 41,556) rendered a judgment setting aside the allowables in so far as they exceeded what they would have been if the Commission had followed the historic method.

The second group of cases (Nos. 42,175, 42,176, 42,185 and 42,230 (Consolidated) and 42,038) involved the same issues but arose under an amended Kansas statute. In these cases the Stevens County District Court found that the Commission was not authorized or required to follow the historic method, and the Finney County District Court, in effect, changed its mind and reached the same conclusion. Both courts rejected Panhandle's and the Royalty Owners' contentions that the evidence required a market demand determination substantially in excess of the nominations.

Apart from its conclusions on the procedural questions previously discussed, the Kansas Supreme Court held: (1) The Commission was neither authorized nor required to follow the historic method of deducting underages; (2) Market demand is a question of fact to be determined by

the Commission from all of the available evidence, and, although the Commission's market demand determination barely exceeded the total of the nominations, Panhandle and the Royalty Owners had failed to establish that the determination was arbitrary or unreasonable. This second holding is not before this Court because Panhandle and the Royalty Owners have not appealed. Panhandle's decision in this respect is the product of a practical realization that it is more important that the litigation be terminated than that the allowables for seven years be recalculated on the basis of the full market demand. The first holding is all that is left in the case. Certainly, the question of whether the Kansas Statute directs or permits the Kansas Commission to deduct underages is a question of Kansas law.

In a companion case (No. 140), the appellant, Kansas-Nebraska Natural Gas Company, Inc., has been candid enough to acknowledge that "At this point in time, the power of the State of Kansas to regulate by limiting the production of natural gas from common sources of supply within the state in order to prevent waste of a valuable resource and to protect the correlative rights of owners of interests in such production is no longer questioned. (*Bandini Petroleum Co.* v. *California Superior Ct.*, (1931) 284 U.S. 8, 76 L. Ed. 136, 52 S. Ct. 103)." (No. 140, Jurisdictional Statement 26).

In none of the related appeals (Nos. 75, 83 and 140) do the appellants complain of the setting of allowables by the Kansas Commission—providing that the Commission establishes allowables according to the so-called historic method. In fact, this is the totality of the complaint, that the Commission departed from the historic method. Reduced to fundamentals, this method was a procedure

whereby the Kansas Commission was limited to performing the mechanical function of a calculating machine, using data furnished by the pipe line companies. Thus the pipe line companies—not the Kansas Commission—controlled allowables by (1) their estimates and (2) the quantities of gas actually taken.

Northern and Cities attempt to make this case fit the mold of *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963). Obviously it will not conform, for this Court based that decision squarely on the fact that the order was directed to the pipe line purchaser, saying:

> "The danger of interference with the federal regulatory scheme arises because these orders are *unmistakably and unambiguously directed at purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State, cf. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340—*a task which would otherwise presumably be the State Commission's*." (372 U.S. at 92; emphasis supplied.)

Here the Kansas Commission has undertaken that task and has directed its orders to producers, not purchasers for resale after transportation in interstate commerce. Of course, these orders may have some residual effect on interstate pipe line companies, as would any other conservation order or safety regulation directed to the producer. This, however, does not destroy the essentially local character of these conservation acts of the Kansas Commission.

Although in some cases the market demand determined by the Commission after it abandoned the historic method

was in excess of the pipe line companies' estimates, this was not burdensome to Northern or Cities. Allowables do not compel the taking of any gas, rather they are permissive and authorize equitable production from each well in a common source of supply. Both Northern and Cities concede that all underages canceled during times pertinent to these appeals have been, or upon application by the party concerned will be, reinstated (Jurisdictional Statement 29, n. 33). They further admit that the Kansas Commission has placed a moratorium upon cancellation of underages (*ibid.*). The fact is that neither Northern nor Cities has been hurt by the allowables approved by the Kansas Supreme Court.

Moreover, as expressly observed by the Kansas Supreme Court (Jurisdictional Statement A34), the Kansas Commission's prior practice of adding canceled underages to the market demand for gas was not questioned in the Kansas courts. Until added to the market demand, gas constituting the canceled underage simply remains in the ground. Under the existing practice no one is deprived of anything. It follows that review of the Kansas Commission's orders by this Court would be inappropriate until the only practice which could conceivably produce injury has been put into effect and has been properly challenged in the Kansas courts.

Though Northern and Cities have tortured the issue in an attempt to make it fit the form of a federal question, the case stripped bare is nothing more than a question of whether a majority of the pipe line companies may control allowables to suit their private purposes or whether the Kansas Commission may set allowables based upon reasonable evidence. The Kansas Commission has not compelled Northern or Cities to take unwanted gas; nor has it

deprived them of an opportunity, equal to that accorded every other purchaser, to take gas from the Kansas Hugoton field. All that the Kansas Commission has done is increase the amount of gas which may be produced.

CONCLUSION

Panhandle Eastern Pipe Line Company, appellee, submits that these appeals should be dismissed because the judgments of the Kansas Supreme Court rest on adequate nonfederal grounds, because no federal question was properly raised and because no substantial federal question is presented

Respectfully submitted,

WENDELL J. DOGGETT
JEFF A. ROBERTSON
CHAS. VANCE
C. C. LINLEY
G. R. REDDING
THOMAS M. LOFTON

BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, Indiana
Of Counsel

August, 1964

APPENDIX A

NORTHERN NATURAL GAS COMPANY et al.

v.

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS et al.

The following summaries appear in Panhandle Eastern Pipe Line Company's Abstract of the Record in Kansas Supreme Court Cases Nos. 41,555 and 41,556, which Abstract is part of the record in these appeals. Bracketed references are to pages in such Abstract. The Kansas Commission's order referred to in the first and third summaries appears in such Abstract at pages 83-87, and the Kansas Commission's order referred to in the second summary appears in such Abstract at pages 100-101.

Petition for Judicial Review—Southwest Kansas Royalty Owners Association

On December 31, 1958, after Petitions by all parties for rehearing had been denied, the Southwest Kansas Royalty Owners Association filed its Petition for a Judicial Review of the Commission's Order determining the six months market demand for gas produced from the Kansas Hugoton Field, which Order has been heretofore set forth.

The Royalty Owners Association filed its Petition for Judicial Review in the District Court of Stevens County, Kansas. It was assigned Case No. 4044 [Page 102].

Petition for Judicial Review—Southwest Kansas Royalty Owners Association

On December 31, 1958, after Petitions for Rehearings by all parties had been denied, the Southwest Kansas Royalty Owners Association filed its Petition for a Judicial Review of the Commission's Order determining the October, 1958, Allowables for the Kansas Hugoton Field.

The Royalty Owners Association filed its Petition for Judicial Review in the District Court of Stevens County, Kansas. It was assigned Case No. 4045 [Page 102].

Petition for Judicial Review—Northern Natural Gas Company

On January 15th, 1959, Northern Natural Gas Company filed its Petition for a Judicial Review of the Commission's Order determining the six months market demand for gas produced from the Kansas Hugoton Field, in the District Court of Finney County, Kansas. It was assigned Case No. 10,589 [Page 138].

APPENDIX B

IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION, and PANHANDLE EASTERN PIPE LINE COMPANY,

Petitioners,

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,

Respondent,

NORTHERN NATURAL GAS COMPANY,

Intervenor.

Cases Numbered: 4044, 4045, 4046, 4047, 4048, and 4049.

Mr. Dale M. Stucky
901 First National Bank Bldg.
Wichita 2, Kansas

Mr. A. E. Kramer
Hugoton, Kansas

Mr. C. C. Linley
Liberal, Kansas

Mr. Chas. Vance
Liberal, Kansas

Mr. Clyde E. Milligan
Kansas Corporation Commission
Topeka, Kansas

Mr. Mark H. Adams
202 Board of Trade Bldg.
Wichita, Kansas

Order of Continuance

The above cases are before this court on:

1. Motion by Interyenor to dismiss for lack of jurisdiction; and

2. Judicial Review of Orders made by The State Corporation Commission of the State of Kansas.

Since the District Court of Finney County, Kansas has taken jurisdiction of the identical matters at issue in the above cases, as well as former companion matters, I can see no good that could result from any judgment by this court until a final disposition has been made of the identical matters in the District Court of Finney County, Kansas.

If this court makes the same findings and renders the same judgment, as those made and to be made by the District Court of Finney County, Kansas, then nothing beneficial is accomplished.

Findings and judgments by this court different or contrary to those made by the District Court of Finney County, Kansas, would result in two appeals to the Supreme Court on the same points.

Such results would not be beneficial to the litigating parties and would be harmful to the prestige and dignity of the judiciary of Kansas.

Therefore, this court, on its own motion, continues the above cases for decision until disposition has been made of the identical matters in the District Court of Finney County, Kansas, or until something further arises that is not at this time foreseen by this court.

/s/ L. L. Morgan
Judge L. L. Morgan
District Judge

APPENDIX C

DISTRICT COURT OF STEVENS COUNTY, KANSAS

Southwest Kansas Royalty Owners' Association, Petitioner, vs. State Corporation Commission of Kansas, Respondent.	Case No. 4104 4105 4110 4117

Order of Consolidation

Now on this 13th day of February, 1960, this action comes on for trial on the merits pursuant to setting of this case made on the call of the docket on the first day of the January term. Southwest Kansas Royalty Owners' Assn. appears by its attorneys, Dale M. Stucky, Robert Cornwell and A. E. Kramer; the Kansas Corporation Commission appears by J. Robert Wilson and John Townsend, its attorneys, and Panhandle Eastern Pipe Line Co. appears by C. C. Linley and Chas. Vance, its attorneys.

Upon oral motion of Panhandle Eastern Pipe Line Company made in open court, and upon argument of counsel, the court finds that cases 4104, 4109 and 4117, and all of the cases heretofore consolidated with them, should be consolidated with Case No. 4105, the market demand case, for the purpose of trial, judgment and further proceedings.

It is by the Court so ordered.

L. L. Morgan,
District Judge.

Approved:

C. C. Linley,
Chas. Vance,
By: C. C. Linley,
Attorneys for Panhandle Eastern Pipe Line Company.

J. Robert Wilson,
John Townsend,
By: John D. Townsend,
Attorneys for Kansas Corporation Commission.

Dale M. Stucky
Robert Cornwell,
A. E. Kramer,
By: Dale M. Stucky,
Attorneys for Southwest Kansas Royalty Owners' Association.

Filed: 2-24-60. John F. Fulkerson, Clerk of the Dist. Court.

APPENDIX D

DISTRICT COURT OF STEVENS COUNTY, KANSAS

The Southwest Kansas Royalty Owners Association, Petitioner, vs. The State Corporation Commission of the State of Kansas, Respondent.	Case No. 4105

Order for Consolidation and Additional Parties

Now, on this 6th day of February, 1960, comes on for hearing the motion of Panhandle Eastern Pipe Line Com-

pany to Consolidate and Join Additional Parties. Panhandle Eastern Pipe Line Company appears by Jeff A. Robertson, C. A. Conoley, C. C. Linley and Chas. Vance, its attorneys. Southwest Kansas Royalty Owners' Association appears by Dale M. Stucky, Robert Cornwell, and Kramer and Nordling, its attorneys. No other appearances are made.

Evidence is heard; the motion is argued and submitted to the Court.

The Court, being fully advised, finds that this case and Case No. 4107 were filed in this Court by separate plaintiffs both seeking judicial review of the same order of the Kansas Corporation Commission; that petitions also seeking to review the same order were subsequently filed in the District Court of Finney County by Colorado Interstate Gas Company, Northern Natural Gas Company, Cities Service Gas Company and Kansas-Nebraska Gas Company.

The said Commission Order is not subject to piece meal review from case to case and Court to Court; all parties who claim to be aggrieved by said order and who have appealed the same or subsequent monthly proration orders and reports of the Commission based thereon are necessary and indispensable parties to, and will have substantial rights affected by the decision in this case.

The Petition for review of the Commission's market demand determination for the 6 month proration period beginning October 1, 1959 and ending March 31, 1960, was filed in this Court before the petition attacking the same error was filed in any other case in either court; that the Commission's allowable orders for the months of October, November and December, 1959, were each based on the Commission's 6 month market demand determination aforesaid; that the jurisdiction of this Court, as to all four

Commission orders, became exclusive upon the prior filing of the market demand controversy herein; that all parties claiming to be aggrieved by said orders should be required to and must present their grievances in a single proceeding.

It Is Therefore by the Court Ordered: That Case No. 4107 in this Court, wherein Panhandle Eastern Pipe Line Company is plaintiff be, and hereby is consolidated with this case for trial and judgment.

It is further ordered that Northern Natural Gas Company, Colorado Interstate Gas Company, Cities Service Gas Company, and Kansas-Nebraska Gas Company be, and they hereby are directed to file in this Court such counter-abstracts of the record and other pleading as they may deem appropriate, on or before February 13, 1960, and to present to this Court and proceed in this Court only for determination of their grievances with the said Order.

It is further ordered that this order be effective as to each of said parties upon actual notice or knowledge of the entry thereof.

L. L. Morgan,
Judge.

Approved:

Panhandle Eastern Pipe Line Company,
By Chas. Vance,
C. C. Linley,
Southwest Kansas Royalty Owners' Association,
By Dale M. Stucky.

A true copy.

/s/ John F. Fulkerson,
Clerk of the District Court of
Stevens County, Kansas.

(Seal)

APPENDIX E

IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS

SOUTHWEST KANSAS ROYALTY OWNERS' ASSOCIATION, Petitioner, vs. THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Respondent.	Case No. 4105

Journal Entry

Now on this 13th day of February, a regular judicial day of the January, 1960 term, this action and the actions consolidated with it by order of the court, came on for trial pursuant to a setting made by the court on the first day of the term.

Petitioner appears by Dale M. Stucky, Robert Cornwell and A. E. Kramer, its attorneys; the Kansas Corporation Commission appears by J. Robert Wilson and John Townsend, its attorneys and Panhandle Eastern Pipe Line Company appears by C. C. Linley and Chas. Vance, its attorneys. All parties announce ready for trial; there are no other appearances.

The Court, having stated that Northern Natural Gas Company, Inc., Cities Service Gas Company and Colorado Interstate Gas Company did not appear on the first day of the term when the case was set for hearing, inquires whether any of said companies lacked actual notice of the order of this Court entered on February 6, 1960.

There is offered in evidence and ordered filed in the case the affidavit of Chas. Vance showing that certified copies of said Court order was mailed by certified mail to all parties and their attorneys on February 6, 1960; that the attached return receipts show delivery to all concerned on February 8, 1960. Thereupon counsel state to the Court that all parties and their attorneys had actual notice of this setting for trial on the merits by mail and otherwise. The court examined the files and finds that, although pleadings filed since the first day of the term appear to have been noticed for the first day of the March term, no application for a continuance has been made by any of the parties.

Thereupon the Court waits for one hour. There are no further appearances. The Court proceeds to hear the case upon argument of counsel and the transcript. At the conclusion thereof, it takes the same under advisement.

Thereafter, and on March 10, 1960, the Court, after being fully advised in the premises finds:

1. That, upon the Court's own motion, the orders made February 6, 1960, should be and the same are hereby set aside insofar as said orders affect and consolidate the cases pending in the Finney County District Court.

2. That the Report and Order dated November 10, 1959, and subsequent allowable orders of the State Corporation Commission are based on substantial competent evidence and are lawful and valid. Said report and order makes reasonable provisions for an orderly process correcting inequities (existing for more than ten years and which have progressively increased) discriminating in favor of the correlative rights of producers and royalty owners in the Oklahoma Hugoton Gas Field and against those in the Kansas Hugoton Gas Field; as provided by the Statutes of Kansas, Section 55-703, 1959 supplement.

It Is Therefore Ordered, Adjudged and Decreed that the Report and Order dated November 10, 1959, and subsequent allowable orders of the State Corporation Commission be and they are hereby affirmed.

/s/ L. L. Morgan,
Judge, District Court.

APPENDIX F

Northern Natural Gas Company's Special Appearance Motion to Vacate and Set Aside the Court's Judgment of March 10, 1960

Thereafter, on March 13, 1960, Motion was filed by Northern Natural Gas Company in consolidated case number 4105 in the District Court of Stevens County, Kansas, to Vacate, Set Aside and Hold for Naught the Court's Judgment of March 10, 1960, and for other relief as therein requested. A true copy of such Motion, without formal parts is as follows:

MOTION

Comes Now, Northern Natural Gas Company, a corporation, appearing specially and for the purpose of this motion only, and moves the court for an order vacating, setting aside and holding for nought the judgment herein entered on Thursday, March 10, 1960, for the reasons that the court was without authority or jurisdiction either of the person of this movant or the subject matter of this action. In support of this motion movant states:

1. That the Southwest Kansas Royalty Owners' Association is not a person aggrieved as that term is used in Sec. 55-606, G.S. 1949, and the filing by it of this purported action numbered 4105 is a nullity and the court thereby acquired no jurisdiction over the subject matter purported

to constitute the basis of a judicial review action; that this is also true and applicable with respect to cases numbered 4104, 4109, 4117 and any and all subsequent purported judicial review actions filed in said court by said Southwest Kansas Royalty Owners' Association purportedly adjudicated by this court's judgment dated Thursday, March 10, 1960.

2. That on February 13, 1960, movant filed in the above entitled case and in all of the other cases in the District Court of Stevens County, Kansas, purported to be adjudged in this court's judgment dated March 10, 1960, motions to quash, set aside and hold for nought this court's order dated February 6, 1960, insofar as it affects Northern Natural Gas Company, together with the findings in such order upon which it purports to be based and the purported service of said order upon movant as well as the purported service of notice of hearing upon which said order purports to be based for the reasons that the court was without authority or jurisdiction either of the person of this movant or the subject matter of movant's review action legally and timely filed on January 22, 1960, and pending as Case No. 19774 in the District Court of Finney County, Kansas, relating to the order or orders of the State Corporation Commission of the State of Kansas referred to in this court's order of February 6, 1960; that although movant's motion last mentioned was timely filed, no hearing has been permitted upon said motion and no order made with respect thereto.

3. That the above entitled action being a nullity, petitioner therein not being a person aggrieved authorized to institute such an action, any attempt to graft thereon other actions by consolidation or otherwise does not give this court jurisdiction of the subject matter purported to

be covered by the above entitled and numbered cause and actions consolidated therewith.

In event the court overrules the foregoing Motion, then this movant makes the following Motion:

MOTION.

Comes Now, Northern Natural Gas Company, a corporation, appearing specially and preserving and alleging its objection to the jurisdiction of the court both with respect to the person of this movant and the subject matter of this action as set forth in the foregoing motion of this movant which by reference thereto is incorporated herein the same as if written herein in words and figures and again respectfully moves this court to vacate, set aside and hold for nought its judgment entered herein on Thursday, March 10, 1960.

Subject to the objections to the jurisdiction of the court as aforestated, Northern Natural Gas Company requests the Court to open up, vacate and set aside its judgment entered Thursday, March 10, 1960, and permit this movant to participate in the presentation of said action on the merits, thereby permitting movant to present its respective contentions and arguments that the order of the State Corporation Commission of the State of Kansas, dated November 10, 1959, from which this purported judicial review action has been instituted, is invalid and should be set aside.

In event the court overrules the foregoing Motion, then this movant makes the following Motion:

MOTION TO VACATE JUDGMENT AND GRANT NEW TRIAL.

Comes Now Northern Natural Gas Company, a corporation appearing specially and preserving its objection to the jurisdiction of the court both with respect to the

person of this movant and the subject matter of this action as set forth in the foregoing motion of this movant which by reference thereto is incorporated herein the same as if written herein in words and figures, and again respectfully moves this court to vacate, set aside and hold for nought its purported judgment entered herein on Thursday, March 10, 1960, and for a new trial for each and all of the following reasons:

First: The court was and is without jurisdiction of this movant and of the subject matter of this action.

Second: Because of abuse of discretion of the court.

Third: Because of accident or surprise which ordinary prudence could not have guarded against whereby movant was not afforded a reasonable opportunity to be heard on the merits of the case.

Fourth: Erroneous rulings of the court.

Fifth: That the decision is contrary to the evidence.

Sixth: Because the service upon this movant purported to be bound by the judgment of this court in this cause entered Thursday, March 10, 1960, was constructive only, even if valid, which is denied.

APPENDIX G

IN THE DISTRICT COURT OF STEVENS COUNTY, KANSAS

Southwest Kansas Royalty Owners Association et al., Petitioners, vs. The State Corporation Commission of the State of Kansas et al., Respondents.	No. 4105

Journal Entry

Now on this 12th day of May, 1960, this matter comes on for hearing pursuant to notice to all parties on the Southwest Kansas Royalty Owners Association's motion to settle and determine the form of a Journal Entry reflecting the rulings and decisions made by this court on March 19, 1960, the Southwest Kansas Royalty Owners Association appears by and through its attorney, Robert T. Cornwell; the State Corporation Commission appears by and through its attorney, John T. Townsend; and Panhandle Eastern Pipe Line Company appears by and through its attorneys, C. C. Linley and Charles Vance. The court, after reviewing the file and being well advised, finds and determines that the following Journal Entry should be and hereby is entered as the court's journal entry covering the hearing held herein on March 19, 1960:

JOURNAL ENTRY

Now on this 19th day of March, 1960, this matter comes on for hearing on the motions filed by Northern Natural Gas Company, Panhandle Eastern Pipe Line Company and the Southwest Kansas Royalty Owners Association.

The State Corporation Commission appears by and through its general counsel J. Robert Wilson; Panhandle Eastern Pipe Line Company appears by and through its attorneys, C. C. Linley and Charles Vance; the Southwest Kansas Royalty Owners Association appears by its attorneys Dale M. Stucky and Robert C. Cornwell; and Mark Adams, Mark Adams II, Floyd Jensen and Daniel Hopkins announce to the court that they appear specially for Northern Natural Gas Company to present its motions filed on February 13, 1960, and March 14, 1960.

Thereupon Northern Natural Gas Company presents its motion, filed on March 14, 1960, to vacate the court's judgment entered herein on March 10, 1960, and the court, after hearing argument of counsel, finds that such motion should be overruled.

It Is So Ordered.

Thereupon Northern Natural Gas Company presents its motion, filed on March 14, 1960, to vacate the court's judgment entered herein on March 10, 1960, and to allow Northern Natural Gas Company to participate in the presentation of said judicial proceedings on the merits, and the court, after hearing argument of counsel, finds that such motion should be overruled.

It Is So Ordered.

Thereupon Northern Natural Gas Company presents its motion, filed on February 13, 1960, to quash, and the court, after hearing argument of counsel, finds that such motion should be overruled.

It Is So Ordered.

Thereupon Northern Natural Gas Company presents its motion, filed on December 26, 1959, to dismiss, and the court, after hearing argument of counsel, finds that

such motion is not properly before this court for determination at this time, and the court finds, in the alternative, that if such motion is properly before this court for determination at this time, such motion should be overruled.

It Is So Ordered.

Thereupon Northern Natural Gas Company, Panhandle Eastern Pipe Line Company and the Southwest Kansas Royalty Owners Association present their motions for a new trial, and the court, after hearing argument of counsel, finds that such motions should be overruled.

It Is So Ordered.

Judge Morgan.